STATE OF MICHIGAN

COURT OF APPEALS

ARBOR WOODS ASSOCIATES,

Plaintiff-Appellant,

v

AMERISURE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 1, 2003

No. 237419
Washtenaw Circuit Court
LC No. 01-000016-NZ

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

In this insurance coverage case, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant, holding that defendant "has no duty to defend, indemnify, and/or provide insurance coverage" under the insurance policy at issue with respect to "all underlying actions," including the related class action, and the trial court's denial of plaintiff's motion for summary disposition and declaratory judgment. We vacate and remand.

This case arises from an underlying action in which numerous owners of mobile homes in the mobile home park owned by plaintiff herein filed suit against plaintiff for damages sustained as a result of the pooling of water in yards, common areas, and under the mobile homes. Relative to the underlying action, defendant, who provided plaintiff with a general commercial liability insurance policy, agreed to undertake plaintiff's defense, but made a reservation of rights regarding coverage for damages. The underlying case proceeded to trial on the claims of only three of the many owners of mobile homes that filed claims against plaintiff (hereafter referred to as the "test" case) and a verdict was rendered in their favor in some respects and against plaintiff herein in other respects. After judgment was entered on the verdict, defendant informed plaintiff that it would not provide coverage because, in defendant's opinion, the judgment was for an amount not covered under the policy. Apparently in response to defendant's denial of coverage, plaintiff filed the instant action against defendant for declaratory judgment, seeking a judgment that plaintiff is entitled to coverage under the policy that defendant issued and that defendant has a duty to defend against ongoing litigation and to indemnify plaintiff against the judgment against plaintiff rendered in the "test" case.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), and thereafter plaintiff filed a cross-motion for summary disposition pursuant to MCR 2.116(I)(2). Defendant attached to its motion the fifth amended complaint in the underlying action, the verdict form and the judgment in the "test" case, its reservation of rights letter of November 6,

1998, its denial of coverage letter of September 19, 2000, a copy of the insurance policy, the instant complaint, and a lease agreement. Plaintiff attached to its motion the portion of the transcript in the "test" case regarding its arguments and the trial court's ruling on a motion for directed verdict. After considering the parties' briefs, attachments and arguments, the trial court found that there was no "occurrence" triggering coverage, and granted summary disposition in favor of defendant. The trial court stated on the record its reasons for its ruling:

> This [c]ourt finds that there are no genuine issues in [sic] material fact in dispute such that summary disposition of this declaratory judgement [sic] action is appropriate. Taking the documentation presented in the light most favorable to Arbor Woods as the non-moving party, this [c]ourt finds that the insurance policy is ambiguous only in that [it] does not define the term accident. However, the Michigan Supreme Court has defined this term in the way identified above. Applying the findings of the jury in the underlying case, this [c]ourt finds that a reasonable finder of fact could not say that the injuries complained of by those plaintiffs were an accident and that they were a casualty or a happening by chance. Because the [c]omplaint alleged that Arbor Woods[']s intentional actions created a direct risk of harm to the injured party pursuant to *Frankenmuth* [*v*] *Masters*, [460 Mich 106; 595 NW2d 832 (1999),] the injury [c]omplained of was not an accident such that Amerisure is not required to cover the verdict in the underlying case – that Amerisure is now required to cover the verdict in the underlying case.

In reliance on its conclusion that there was no occurrence, the trial court further held that defendant had no duty to provide a defense or to provide plaintiff with coverage for the judgment entered against it in the "test" case and "all underlying actions." This appeal ensued.

On appeal, plaintiff argues, in essence, that the trial court erred in granting summary disposition in favor of defendant and denying summary disposition in favor of plaintiff. Specifically, plaintiff provides two main arguments: (1) that defendant has a duty to defend the ongoing litigation, and (2) that the trial court should have ordered defendant to provide coverage for the judgment in the "test" case because there was "property damage" triggering coverage, there was an "occurrence" and "accident" because plaintiff did not expect or intend the property damage, and none of the exclusions contained within the policy apply, thereby entitling plaintiff to declaratory judgment. Contrary to plaintiff's assertions, defendant argues that the trial court did not err in granting summary disposition in its favor because there was no "occurrence" and no "property damage" under the policy, and even if there were, the policy excludes coverage in the present case.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999). Further, resolution of the issue before us

involves the construction and interpretation of an insurance contract, which is a preliminary question of law for a court to determine and which this Court reviews de novo. *Allstate Ins Co v Muszynski*, 253 Mich App 138, 140; 655 NW2d 260 (2002).

Section I, Coverage A of the insurance policy deals with insurance coverage for bodily injury and property damage liability and provides the following insuring agreement, in relevant part:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. . . .
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> * * *
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> b. This insurance applies to "bodily injury" and "property damage" only of
>
> (1) The "bodily injury" or "property damage"[1] is caused by an "occurrence". . . .

The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In light of the language of the insurance policy, coverage in the present case depends on whether an "occurrence" causes "property damage," as defined in the policy, and if so, whether coverage is precluded by the exclusions in the policy.

While the policy defines "occurrence" as an accident, it does not provide a definition of accident. However, our Supreme Court has defined accident as "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." *Allstate Ins Co v McCarn*, 466 Mich 277, 281; 645 NW2d 20 (2002), quoting *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999), quoting *Arco Ind Corp v American Motorists Ins Co*, 448 Mich 395, 404-405; 531 NW2d 168 91995) (Mallett, J.). "Accidents are evaluated from the standpoint of the insured, not the injured party." *McCarn, supra* at 282, citing *Masters, supra* at 114 n 6. The *McCarn* Court explained that

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[1] The policy defines "property damage" as follows:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

> if both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured. [*Id.* at 282-283.]

Here, contrary to the trial court's conclusion, we find that summary disposition is inappropriate because neither party properly supported their respective claims, nor refuted the other's claims, with regard to whether there was an occurrence. Simply stated, we do not believe that the factual record presented in connection with the parties' cross-motions for summary disposition resolves conclusively in either parties' favor the disputed issues of fact regarding whether there was an occurrence. The fifth amended complaint in the underlying action may have been useful to address the duty to defend, but in our view, it establishes little or nothing about whether an "occurrence" happened. The record concerning the motion for directed verdict is interesting and provides some insight into the theories that were submitted to the jury in the "test" case, but again does little to establish a factual record on which to resolve the parties' different views of this claim. The same is true of defendant's letters of November 6, 1998, and September 19, 2000. These letters provide information regarding defendant's position on the claim and provide a historical context, but provide no factual basis on which to determine if there was an occurrence. Finally, there is the jury verdict form and the judgment in the "test" case. These exhibits tell us that the jury in the "test" case awarded damages on a landlord-tenant type claim for breach of a duty to maintain property in a fit condition and in reasonable repair and found no cause for action on the fraud claim. Again, these are interesting and useful to provide context, but it is not the kind of factual record that gives insight into what happened, when and by whom from which this Court is able to make any legal determination about the existence of an occurrence. Consequently, we find that the factual record failed to sufficiently address, let alone resolve, the issues in dispute, including whether there was an "occurrence" as defined in the policy, whether defendant has a duty to defend, and whether defendant is liable for the judgment in the "test" case. Further, for the same reasons, we find the record before us insufficient to resolve the alternative grounds for summary disposition that the parties argued, including whether there was "property damage" as defined in the policy and whether the policy's exclusions preclude coverage.

Vacated and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell